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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 THE POKÉMON COMPANY
11 INTERNATIONAL, INC.,

12 Plaintiff,

13 v.
14 JON SAHAGIAN; DOES 1-5,

15 Defendants.

16 No. 2:15-cv-00866 TSZ

17 PLAINTIFF'S MOTION FOR
18 PRELIMINARY INJUNCTION

19 **NOTE ON MOTION CALENDAR:**
20 **JUNE 26, 2015**

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I. INTRODUCTION

Pursuant to 17 U.S.C. §§ 502(a) and 1203(b)(1), and Fed. R. Civ. P. 65(a), Plaintiff The
Pokémon Company International, Inc. (“TPCi”) seeks preliminary injunctive relief enjoining
Defendant Jon Sahagian from continuing his blatant and willful infringements of TPCi’s
copyrighted works and his use of false copyright management information in connection with his
infringing activities in violation of the Digital Millennium Copyright Act.

II. FACTUAL BACKGROUND

A. The Pokemon Trading Card Game.

TPCi manufactures, markets, and distributes a variety of entertainment products, including movies, television shows, games, and toys throughout the United States and around the world. (Complaint ¶ 7; Declaration of David Schwimmer in Support of Plaintiff's Motion for Preliminary Injunction ("Schwimmer Decl.") ¶ 3.)

1. The “Offline” Pokémon Trading Card Game.

One pillar of TPCi's business is the popular Pokémon trading card game ("the Pokémon TCG"), which was first introduced more than a decade ago. (Schwimmer Decl. ¶ 4.) In the Pokémon TCG, each player acts in the role of a "Trainer" and uses a number of different types of cards to play the game, including Pokémon cards, which represent particular characters known as "Pokémon." Players use his/her Pokémon to battle the Pokémon of other Trainers. Between games, players collect cards to assemble their optimal decks. (Complaint ¶ 8; Schwimmer Decl. ¶ 4.) Since the Pokémon TCG was introduced, TPCi has created and released thousands of trading cards, creating a rich and diverse Pokémon universe. (Complaint ¶ 10; Schwimmer Decl. ¶ 4.)

Each Pokémon trading card contains original artwork depicting a unique Pokémon character, that character's powers and abilities, a description of the character, and other data indicating the card's value. For example, following is a copy of a card depicting one version of the iconic Pokémon character Pikachu:



(Complaint ¶ 9; Schwimmer Decl. ¶ 5.)

TPCi owns exclusive rights under the Copyright Act for the artwork and characters that TPCi has developed over thousands of trading cards for more than a decade (collectively, “the Pokémon Works”). (Complaint ¶ 10; Declaration of Kim Warren in Support of Plaintiff’s Motion for Preliminary Injunction (“Warren Decl.”) ¶ 4.) TPCi registers the Pokémon Works with the United States Copyright Office and has obtained copyright registration certificates for its registrations. (Complaint ¶ 10; Warren Decl. ¶ 4, 5.)

Pikachu, the most recognizable Pokémon within the Pokémon universe, has become TPCi’s principal mascot for the company and the Pokémon brand worldwide. (Complaint ¶ 18; Schwimmer Decl. ¶ 6.) Pikachu appears on numerous cards in the Pokémon TCG, and is featured in or around the branding for championship tournaments and other events TPCi organizes with respect to the Pokémon TCG. (Complaint ¶ 18; Schwimmer Decl. ¶ 6.) Another example of the many Pikachu Pokémon TCG cards is pictured below:



(Complaint ¶ 18; Schwimmer Decl. ¶ 6.)

Other Pokémon have generated strong followings from fans over the years from, in part, frequent appearances in the Pokémon TCG. (Complaint ¶ 18; Schwimmer Decl. ¶ 7.) For example, Charizard regularly appears in the Pokémon TCG and remains the card most coveted by collectors. Charizard has also been featured in or around the branding for Pokémon TCG championship tournaments and other TCG events. (Complaint ¶ 19; Schwimmer Decl. ¶ 7.)

Mewtwo is another of the most popular Pokémon. Mewtwo is also frequently featured in the Pokémon TCG and in various Pokémon media and products. (Complaint ¶ 20; Schwimmer Decl. ¶ 8.) Examples of a Charizard TCG card (left) and a Mewtwo TCG card (right) are pictured below:



(Complaint ¶¶ 19, 20; Schwimmer Decl. ¶¶ 7, 8.) Pikachu, Charizard, and Mewtwo are just three of the more than 700 Pokémon which populate the diverse Pokémon universe that TPCi has developed over more than a decade. (Complaint ¶ 21; Schwimmer Decl. ¶ 9.)

TPCi products, and specifically the Pokémon TCG expansion sets, are rolled out to significant fanfare and marketed to millions of users in the United States and around the world. For example, in 2014, TPCi invested more than \$6 million in domestic advertising and promotions associated with the Pokémon TCG. (Complaint ¶ 11; Schwimmer Decl. ¶ 10.)

2. PTCGO—The “Online” Version Of The Pokémon Trading Card Game.

TPCi has also developed and released Pokémon TCG Online (“PTCGO”), an online version of the Pokémon TCG made available through TPCi’s website and mobile apps.

(Complaint ¶ 12; Declaration of Andrew Finch in Support of Plaintiff’s Motion for Preliminary Injunction (“Finch Decl.”) ¶ 3.) Following is an image captured from the PTCGO:



14 (Complaint ¶ 12; Finch Decl. ¶ 3.)

15 To play PTCGO, users download software. PTCGO users can engage in some basic play
 16 for free as guests but typically register to create a TPCi account and purchase physical Pokémon
 17 TCG products from TPCi, including physical trading cards. (Complaint ¶ 13; Finch Decl. ¶ 4.)
 18 Registering to create a TPCi account enables a user to participate in daily challenges and
 19 tournaments and to obtain rewards. (Complaint ¶ 13; Finch Decl. ¶ 4.) Purchases of physical
 20 Pokémon TCG products allow players to obtain codes that they can use within PTCGO to
 21 acquire additional digital cards, decks, and customization items. (*Id.*) For example, if a player
 22 buys a “Booster Pack” containing additional physical Pokémon TCG cards, they will receive a
 23 code that unlocks the digital version of the “Booster Pack,” which they can thereafter use while
 24 playing the PTCGO. Similarly, if a player purchases a pre-built 60-card theme deck of Pokémon
 25 TCG cards, they will receive a code which they can redeem for the digital version of that theme
 26 deck in the PTCGO. (Finch Decl. ¶ 4.)

27 As a result, PTCGO is a strong driver of sales of Pokémon merchandise and has become

1 a key part of the overall user experience and an integral part of the PokéMon TCG as a whole.
 2 For example, in 2015, PTCGO has averaged more than 100,000 games started per day, and
 3 through April 2015, more than 1.3 million codes were redeemed in connection with PTCGO
 4 play. (Complaint ¶ 14; Finch Decl. ¶ 5.)

5 **B. Sahagian's Infringing Uses Of TPCi's Copyrighted PokéMon Works.**

6 Defendant Jon Sahagian, using the online name "Water PokéMon Master," owns and
 7 operates a website located at www.pokebeach.com ("the PokéBeach Site"), which is marketed as
 8 the "Ultimate PokéMon Fansite." (Complaint ¶ 22; Declaration of Sean M. McChesney in
 9 Support Plaintiff's Motion for Preliminary Injunction ("McChesney Decl.") ¶ 3, Exh. A at 1.)

10 1. Background And Features Of The PokéBeach Site.

11 The PokéBeach Site is highly interactive. Users can register to create a PokéBeach
 12 account and participate in a variety of PokéMon-related forums and chat rooms. (Complaint ¶ 23;
 13 McChesney Decl. ¶ 4, Exh. B.) The PokéBeach Site also offers an "Article Program" which
 14 features weekly articles by the PokéMon TCG's most accomplished players that analyz[e] the
 15 current metagame and latest decks. (Complaint ¶ 24; McChesney Decl. ¶ 5, Exh. C.) Users can
 16 also access "Premium articles" by paying for a weekly, monthly, or quarterly subscription. (*Id.*)

17 An entire section of the PokéBeach Site is devoted to the PokéMon TCG, including
 18 categories for "TCG Resources," "PokéBeach's TCG Forums," and "TCG Sets & Card Scans."
 19 (Complaint ¶ 26; McChesney Decl. ¶ 6, Exh. D.)

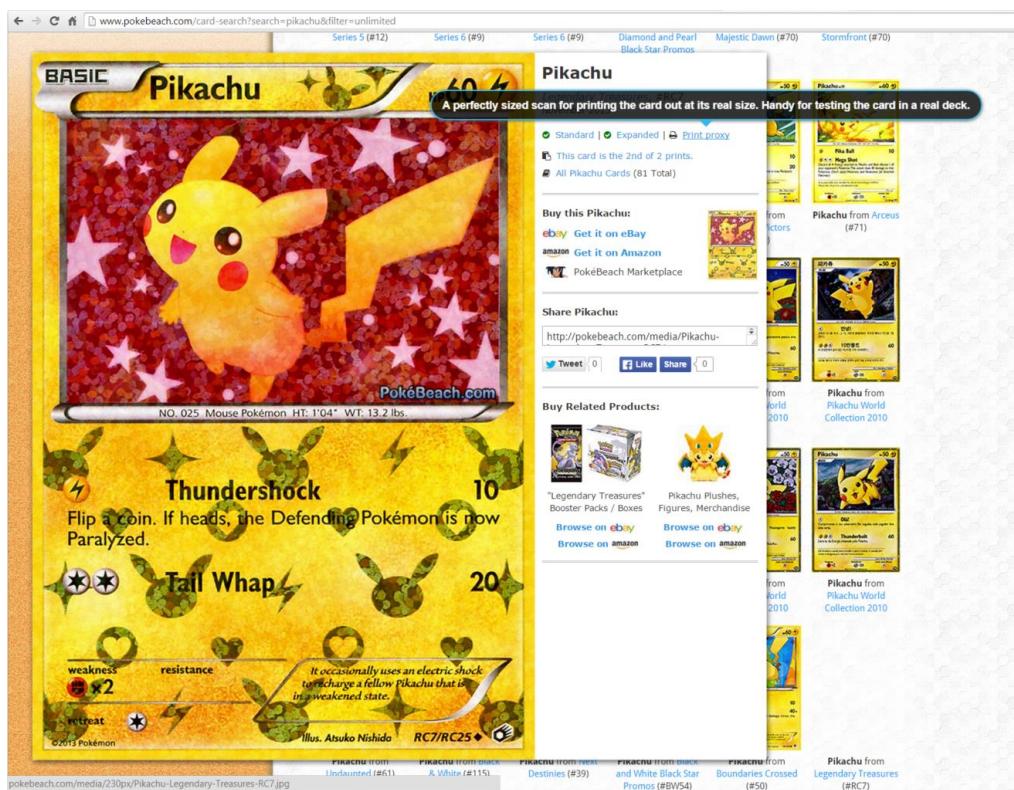
20 The "TCG Sets & Card Scans" category of the PokéBeach Site includes trading card
 21 scans from TPCi's PokéMon TCG for "Standard Sets," "Expanded Sets," "Unlimited Sets," and
 22 "Promos/Misc." (*Id.*) Recently, in announcing the features of the revamped PokéBeach Site that
 23 debuted in May 2015, Sahagian boasted about the breadth of the PokéMon card scans feature:

24 The site now features a totally awesome card search that lets you look up any card
 25 on the fly! You can also see information about the card, if the card is legal in
 26 Standard or Expanded, how many times it's been reprinted, links to what it was
 27 reprinted from, any conditional notes for using the card, **links to buy the cards**
(which help support the site), and a couple of other features . . .

1
 2 The listings [of card scans] contain every possible card you can use in your decks,
 3 even old cards that are still legal (such as Potion). You can also filter the cards in
 4 various ways, such as seeing all Water-type Pok  mon, all Pok  mon-EX, all
 5 Stadiums, and all old cards outside of the current range of Standard sets that are
 6 still legal. It's an invaluable resource to any player! Best part is that it updates
 whenever I add a new set all by itself, so there's much less manual labor involved
 than in 2005.

7 (McChesney Decl. ¶ 7, Exh. E at 7 (emphasis added).) The "TCG Sets & Card Scans" section of
 8 the Pok   Beach Site contains scans of all or nearly all of TPCi's Pok  mon TCG cards that TPCi
 9 has created over more than a decade. (Complaint ¶ 26; Schwimmer Decl. ¶ 11.)

10 Clicking on any of the cards in the "TCG Sets & Card Scans" category on the Pok   Beach
 11 Site displays a larger scanned image of the card on which a "Pok   Beach.com" watermark has
 12 been superimposed in the right bottom corner of the character image on the card. (Complaint ¶
 13 30; *see also infra* at 15:10-16:11.) Following is an image of a scanned Pikachu trading card
 14 available on the Pok   Beach Site:



1 (Complaint ¶ 30; McChesney Decl. ¶ 9, Exh. G.)

2 The informational box appearing to the right of the scanned image of the trading card
 3 allows the user to view all of the cards for Pikachu. (Complaint ¶ 31.) It also offers a “Print
 4 proxy” option, which is described as a “perfectly sized scan for printing the card out at its real
 5 size. Handy for testing the card in a real deck.” (Complaint ¶ 31.) The box also includes links to
 6 third-party retailers of Pokémon merchandise, which Sahagian admits generates revenue for and
 7 “help[s] support” the PokéBeach Site. (Complaint ¶ 32; *supra* 6:23.) Numerous other links to
 8 third-party retailers also appear elsewhere on the PokéBeach Site. (Complaint ¶ 32.)

9 The PokéBeach Site staff even includes a dedicated “Card Scanner” as well as three
 10 “Scan Editors,” including “Water Pokémon Master” (aka Sahagian). (Complaint ¶ 29;
 11 McChesney Decl. ¶ 3, Exh. A at 4.) In touting the “new” PokéBeach Site unveiled in May
 12 2015—which included a number of features that specifically exploited TPCi’s intellectual
 13 property—Sahagian emphasized the greatly improved quality of the card scans on the site:

14 All of the scan pages have totally been redone to show card thumbnails, which
 15 you can then open to see information about the card.

16

17 Shakespeare, our card scanner since the early 2000s, has also rescanned his entire
 18 collection using Dolby THX HD 5.1 SSD Hokie Pokéy technology. The scans are
 19 even higher quality than before! We are still editing most of the scans, but the
 20 most recent sets are using the newer images. Sets using the older scans have all
 21 been reprocessed to be larger than before.

22 (Complaint ¶ 29; McChesney Decl. ¶ 7, Exh. E at 7.)

23 2. “TCG One,” An Infringing Version Of TCG Online (PTCGO).

24 The PokéBeach Site also includes a “Activities” section that offers access to “PokéBeach
 25 Tournaments & Activities” and to “Pokémon Showdown,” a “Pokémon battle simulator that lets
 26 you build Pokémon teams and battle other players.” (Complaint ¶ 25; McChesney Decl. ¶ 10,
 27 Exh. H.)

28 The “Activities” section of the PokéBeach Site also offers users access to “TCG One,” a
 29 “powerful TCG simulator that lets you build decks, battle others, and so much more!”

1 (Complaint ¶¶ 35, 36.) The PokéBeach Site boasts that TCG One, which Sahagian announced in
 2 May 2015, is “[h]osted exclusively by PokéBeach” and was created by “Axpended,” who is
 3 identified as a member of the “Notable PokéBeach Staff.” (Complaint ¶ 35; McChesney Decl. ¶
 4 3, Exh. A at 3, ¶ 7, Exh. E at 3, 4.)

5 According to the PokéBeach Site’s “TCG One Guide,” TCG One is:

6 [b]ursting at the seam with features, you can build decks out of all available cards,
 7 use pre-existing decks built by other members, chat with players, and even play in
 8 a “Career” mode where you start with a basic deck and earn cards as you win
 9 matches. The simulator is a great way to practice for real tournaments and is
 10 especially helpful for players who want to learn how to play the TCG! The
 11 program even has old cards programmed into it, meaning you can play with all
 12 your classic favorites . . . and under the formats and rules of their time!

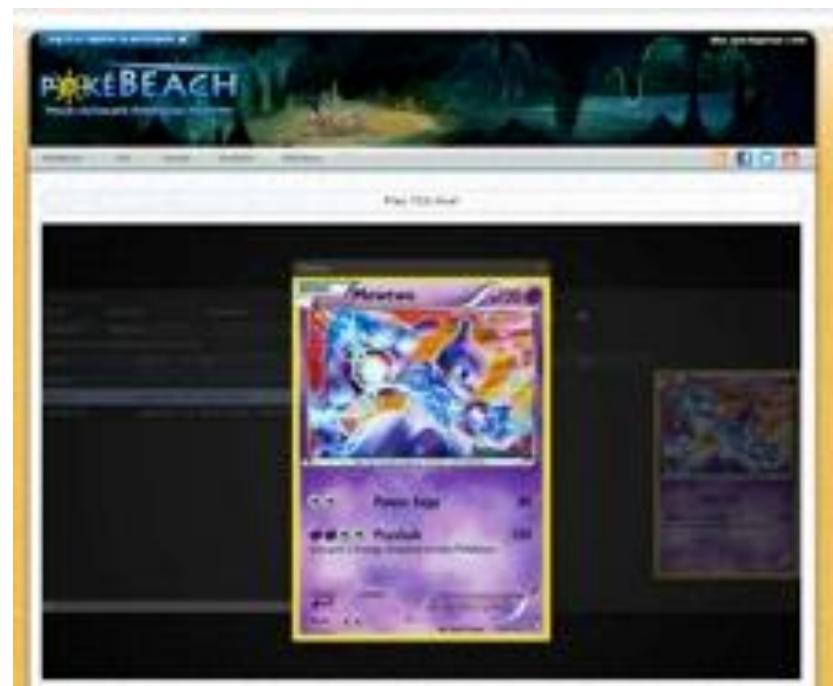
13 (Complaint ¶ 36; McChesney Decl. ¶ 8, Exh. F at 1.)

14 As can be seen in the following image from the PokéBeach Site’s “TCG One Guide,”
 15 TCG One features full-color scanned images of TPCi’s Pokémon TCG trading cards, at least
 16 some of which appear to again have the “PokéBeach.com” watermark superimposed on them:
 17



27 (Complaint ¶ 39; McChesney Decl. ¶ 8, Exh. F at 2.)

1 Pictured below are two images from within TCG One depicting reproductions of TPCi's
2 Pok  mon TCG cards referenced above (*see supra* at 3:10, 4:5):
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27 (Complaint ¶ 40; McChesney Decl. ¶ 11, Exh. I.)

1 The PokéBeach Site’s “TCG One Guide” also equates the TCG One game with the
 2 official PTCGO, noting that users can use Pokémon’s “official simulator, ‘Pokémon Trading
 3 Card Game Online.’” (Complaint ¶ 37; McChesney Decl. ¶ 8, Exh. F at 1.) And, self-described
 4 TCG One creator “Axpendedix,” in describing the features of TCG One — including “[r]eal and
 5 big card images” and a long list of currently available card sets — boasted that “[i]t means you
 6 can select any card in these sets and play like ptcgo!” (Complaint ¶ 38; McChesney Decl. ¶ 12,
 7 Exh. J at 1, 2.)

8 **III. DISCUSSION**

9 **A. The Preliminary Injunction Standard.**

10 Under Section 502(a) of the Copyright Act, a Court is authorized to grant injunctive relief
 11 “on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.” 17
 12 U.S.C. § 502(a). Section 1203(b)(1) of the Digital Millennium Copyright Act (“DMCA”)
 13 similarly authorizes preliminary injunctive relief “to prevent or restrain a violation” of, as
 14 relevant here, Section 1202 of the DMCA. 17 U.S.C. § 1203(b)(1).

15 “*A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on
 16 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
 17 balance of equities tips in his favor, and that an injunction is in the public interest.*” *Winter v.
 18 Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Shell Offshore, Inc. v.
 19 Greenpeace, Inc.*, 709 F.3d 1281, 1289 (9th Cir. 2013).

20 **B. Preliminary Injunctive Relief Is Appropriate To Restrain Defendant’s Widespread 21 Infringement Of TPCi’s Copyrighted Works And His Publication Of False CMI.**

22 Anyone who violates any of the copyright owner’s exclusive rights under the Copyright
 23 Act—including the right to reproduce and distribute the copyrighted works and to prepare
 24 derivative works from those works—is an infringer of the copyright in the works at issue. 17
 25 U.S.C. §§ 106(1)-(3), 501(a). There are two essential elements of a copyright infringement
 26 claim: (1) ownership of a valid copyright; and (2) copying of constituent original elements of the
 27 work. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Funky Films, Inc. v.*

1 *Time Warner Entm't Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006).

2 That TPCi owns valid copyrights in the Pokémon Works, including the Pokémon TCG
 3 trading cards, is beyond dispute. And the Pokémon Works are indisputably original works of
 4 authorship possessing far more than the “minimal degree of creativity” required for copyright
 5 protection. *Feist*, 499 U.S. at 345. Additionally, TPCi has provided representative certificates of
 6 copyright registration as well as a listing of other relevant registrations, (Complaint ¶ 10, Exh. A;
 7 Warren Decl. ¶ 4, Exhs. A, B; ¶ 5, Ex. C), which “constitute prima facie evidence of the validity
 8 of the copyright and of the facts stated in the certificate[s],” including TPCi’s ownership of valid
 9 copyrights. 17 U.S.C. § 410(c); *see also United Fabrics Int'l, Inc. v. C&J Wear, Inc.*, 630 F.3d
 10 1255, 1257-58 (9th Cir. 2011); *Bach v. Forever Living Prods. U.S., Inc.*, 473 F. Supp. 2d 1127,
 11 1133 (W.D. Wash. 2007).

12 Thus, the key question is whether TPCi can demonstrate a likelihood of showing direct
 13 and contributory infringement, as well as publication of false copyright management
 14 information. As set forth below, it clearly does.

15 1. TPCi Provides Overwhelming Evidence Of Direct Copyright Infringement.

16 The evidence of Sahagian’s direct copying of the Pokémon Works in their entirety is
 17 overwhelming. Even a cursory review of Sahagian’s PokéBeach Site reveals thousands of full-
 18 color scans of TPCi’s Pokémon TCG cards. (*See, e.g.*, Schwimmer Decl. ¶ 11.) The PokéBeach
 19 Site even has a dedicated “Card Scanner” staff member, as well as three “Scan Editors,”
 20 including Sahagian. (Complaint ¶ 29; McChesney Decl. ¶ 3, Exh. A at 4.)

21 Moreover, Sahagian makes repeated admissions of direct copying of TPCi’s Pokémon
 22 TCG cards on his PokéBeach Site. For example, in touting the features of the revamped
 23 PokéBeach Site in May 2015, Sahagian boasted that “[a]ll of the scan pages have totally been
 24 redone” and that “the scans are even higher quality than before!” (Complaint ¶ 29; McChesney
 25 Decl. ¶ 7, Exh. E at 7.) He also markets the Pokémon TCG card scans section of the PokéBeach
 26 Site as “an invaluable resource to any player,” explaining that the lists of card scans “contain
 27 every possible card you can use in your decks, even old cards that are still legal[.]” (*Id.*)

With respect to the TCG One game, Sahagian's PokéBeach Site is the "exclusive host" to TCG One, which is "fully integrated" into the site. (McChesney Decl. ¶ 3, Exh. E at 3, 4.) TCG One was created by a member of the "Notable PokéBeach Staff" and Sahagian admits to working with the creator to "figur[e] out ways [they could] make the TCG even more fun and exciting for fans." McChesney Decl. ¶ 3, Exh. E at 8.) Further, the TCG One utilizes scans of Pokémon TCG cards, all or nearly all of which bear Sahagian's "PokéBeach.com" watermark, demonstrating that his infringing scans of TPCi's Pokémon trading cards form an integral part of the infringing TCG One game. (McChesney Decl. ¶ 11, Exh. I; *see also* Complaint ¶ 40.) Sahagian's PokéBeach Site boasts that TCG One is a "simulator" and a "way to practice" for Pokémon TCG tournaments—in other words, Sahagian all but admits that TCG One is an unauthorized version of the PTCGO.

2. TPCi Also Establishes A Likelihood Of Proving Contributory Infringement.

TPCi similarly establishes a high likelihood of succeeding on its claim for contributory copyright infringement. A defendant is liable for contributory copyright infringement if he "(1) knew of the direct infringement; and (2) either induced, caused, or materially contributed to the infringing conduct." *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1072 (9th Cir. 2013). "Material contribution turns on whether the activity in question 'substantially assists' direct infringement." *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936, 943 (9th Cir. 2011).

There can be no dispute that Sahagian knew of the direct infringement of TPCi's copyrighted Pokémon Works. He is the admitted owner and operator of the PokéBeach Site, which contains a section devoted to scanned images of all, or nearly all, of TPCi's Pokémon trading cards. (Schwimmer Decl. ¶ 11; *see also* Complaint ¶ 26.) And, as described above (*see supra* at 12:20-26), he has marketed his PokéBeach Site in large part on the scope and quality of the Pokémon card scan feature.

With respect to the TCG One game, Sahagian advertises that his PokéBeach Site is the "exclusive host" to the game and that it is "fully integrated" into the site. (McChesney Decl. Exh.

E at 3; *see also* Complaint ¶ 35.) The Ninth Circuit has stated unequivocally that “[t]here is no question that providing direct infringers with server space satisfies that [substantially assists] standard.” *Louis Vuitton*, 658 F.3d at 943; *see also Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (stating that a secondary infringer can materially contribute to infringing activity by “providing the site and facilities for known infringing activity”). Thus, this fact alone establishes that there is “no question” that Sahagian materially contributed to the direct infringement of TPCi’s copyrighted Pokéémon Works with respect to the TCG One game. *Louis Vuitton*, 658 F.3d at 943-44 (stating that the servers were “an essential step in the infringement process”) (internal quotation marks omitted).

Sahagian also admits to a significant role in the development of TCG One, which was created by “Axpendix,” a member of the “Notable PokéBeach Staff.” (McChesney Decl. Exh. A at 3; *see also* Complaint ¶ 35.) For example, Sahagian stated that “it’s always been a blast talking to [the creator of TCG One] about his program and figuring out ways we can make the TCG even more fun and exciting for fans.” (McChesney Decl. Exh. E at 8.) Moreover, it appears that most, if not all, of the Pokéémon TCG card images in TCG One bear the “PokéBeach.com” watermark, suggesting that Sahagian provided the Pokéman TCG card scans from his website for use in the TCG One game.

Therefore, as demonstrated above, TPCi has established a high likelihood of succeeding on the merits of both its direct and contributory copyright infringement claims against Sahagian.

20 3. Sahagian Admittedly Posted False Copyright Management Information.

Section 1202(a) of the DMCA states that “[n]o person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement . . . provide copyright management information that is false[.]” 17 U.S.C. § 1202(a)(1). “Copyright management information” (“CMI”) is defined to include, in part, the following types of information when conveyed in connection with copies or displays of a work, including in digital form: “(1) The title and other information identifying the work, including the information set forth on a notice of copyright”; “(2) The name of, and other identifying information about, the author of a work”; and “(3) The

1 name of, and other identifying information about, the copyright owner of the work, including the
 2 information set forth in a notice of copyright.” 17 U.S.C. § 1202(c)(1)-(3).

3 Thus, there are two prerequisites for establishing a violation of Section 1202 of the
 4 DMCA: “(1) the person providing, distributing or importing the false [CMI] must know the
 5 [CMI] is false, and (2) the person providing, distributing, or importing the false [CMI must] do
 6 so with the intent to induce, enable, facilitate or conceal an infringement of any right under title
 7 17.” *Ward v. Nat'l Geographic Soc'y*, 208 F. Supp. 2d 429, 449 (S.D.N.Y. 2002) (internal
 8 quotation marks omitted). The currently available facts demonstrate that TPCi is likely to
 9 succeed on the merits of its DMCA claim against Sahagian.

10 First, the scanned Pokémon trading cards appearing on Sahagian’s PokéBeach Site
 11 clearly bear a “PokéBeach.com” watermark that has been superimposed on the images. An
 12 example of this alteration of TPCi’s Pokémon TCG cards is illustrated below:



25 (Complaint ¶ 33; McChesney Decl. ¶ 9, Exh. G.)

26 Sahagian’s use of the “PokéBeach.com” watermark in this manner is the functional
 27 equivalent of a notice of copyright authorship and/or ownership, thereby falling within one or all

1 three definitions of CMI set forth above. *See* 17 U.S.C. § 1202(c)(1)-(3).

2 Second, Sahagian cannot claim to be ignorant of the falsity of the “PokéBeach.com” CMI
 3 superimposed on his scans of TPCi’s PokéMon trading cards. On his PokéBeach Site, Sahagian
 4 describes himself as a committed PokéMon fan since childhood, and claims to have participated
 5 in TCG tournaments and worked at several “PokéMon websites” in the late 1990s and early
 6 2000s. (McChesney Decl. ¶ 3, Exh. A at 1.) And according to Sahagian, he debuted his
 7 PokéBeach Site to the public nearly 12 years ago in July 2003. (*Id.*) Moreover, his
 8 “PokéBeach.com” watermark was placed on images of TPCi’s PokéMon trading cards that were
 9 scanned by him and/or at his direction. Based on this history, there can be no dispute that
 10 Sahagian knew that the CMI (the “PokéBeach.com” watermark) superimposed onto the scanned
 11 images of TPCi’s PokéMon TCG cards was false.

12 Third, the facts establish that Sahagian placed the false CMI on his scans of TPCi’s
 13 PokéMon trading cards with the intent to, at least, enable, facilitate, or conceal the infringement
 14 of TPCi’s copyrighted PokéMon Works. As described at some length above (*see supra* at 6:11-
 15 8:19), Sahagian’s PokéBeach Site includes, as a central feature of the site, hundreds if not
 16 thousands of scans of TPCi’s PokéMon TCG cards. The scanned PokéMon TCG card images
 17 were modified to include the “PokéBeach.com” watermark. The “obvious implication” of these
 18 facts is that Sahagian used his “PokéBeach.com” watermark with the intent to facilitate and/or
 19 conceal his widespread infringement by suggesting that his site was the author or owner of the
 20 copyrights in the scanned images, or an authorized licensee. *See Logan Developers, Inc. v.*
Heritage Bldgs., Inc., Case No. 7:12-CV-323, 2013 U.S. Dist. LEXIS 140909, *24-25 (E.D.N.C.
 21 Sept. 30, 2013) (where home designer and builder placed its name on infringing house designs
 22 and advertised the designs on the Internet, court concluded that the “obvious implication” was
 23 that builder did so “with the intent to conceal its infringement”).

25 Consequently, TPCi has also established a likelihood of succeeding on the merits of its
 26 DMCA claim based on Sahagian’s publication of false CMI on his scans of TPCi’s copyrighted
 27 PokéMon Works.

1 **C. Absent Injunctive Relief, TPCi Is Likely To Suffer Irreparable Harm Because
2 Sahagian Would Continue To Operate An Infringing Version Of TPCi's PTCGO.**

3 Absent a preliminary injunction, TPCi is likely to suffer irreparable harm that is difficult
4 to quantify and therefore not appropriately remedied by monetary damages. Courts have found
5 irreparable harm in a variety of situations, such as due to loss of customer goodwill, an improper
6 suggestion of affiliation, the difficulty of measuring damages and a defendant's expected
7 inability to pay. Here, each of these factors offer independent bases for concluding that TPCi will
8 be irreparably harmed.

9 1. TCG One Causes Irreparable Harm Because Of A Sub-Par User Experience.

10 With respect to the PokéBeach Site's TCG One game, because it is an unauthorized,
11 infringing facsimile of TPCi's PTCGO, TCG One does not encourage or enable players to
12 purchase physical Pokémon merchandise in order to acquire additional digital cards, decks, and
13 customization items, which is a key aspect of TPCi's PTCGO and integral part of the user
14 experience. TCG One thus results in a sub-par Pokémon online trading card game experience.
15 (Finch Decl. ¶ 7; *see also* Complaint ¶ 37.) Moreover, by siphoning away Pokémon online
16 trading card game players, the infringing TCG One game divests TPCi of the ability to monitor,
17 support, control and make improvements to the quality of the players' online Pokémon TCG
18 experience. (Finch Decl. ¶ 8.) Unlike PTCGO, TCG One is not subject to the same policies TPCi
19 has in place to main a positive gaming environment, and this is another way in which the user
20 experience will be sub-par. (Finch Decl. ¶ 9.) This type of reputational harm to TPCi resulting
21 from disgruntled players dissatisfied by their experience as a result of their use of the infringing
22 TCG One game is difficult to measure or remedy with monetary damages. *See MySpace, Inc. v.*
23 *Wallace*, 498 F. Supp. 2d 1293, 1305 (C.D. Cal. 2007) ("Harm to business goodwill and
24 reputation is unquantifiable and considered irreparable.").

25 2. The Suggestion Of Affiliation Also Causes Irreparable Harm.

26 The same is true for the loss of goodwill TPCi is likely to suffer from Pokémon fans who
27 believe that TPCi has licensed the hundreds of scans of TPCi's Pokémon trading cards on

1 Sahagian's PokéBeach Site, a belief that is all too likely given his use of the "PokéBeach.com"
 2 watermark on the scans. *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 285 (2d Cir. 2012) (stating
 3 that "[h]arm may be irreparable where the loss is difficult to replace or measure"), *cert. denied*,
 4 *ivi, Inc. v. WPIX, Inc.*, 133 S. Ct. 1585 (2013); *Rent-A-Center, Inc. v. Canyon Television &*

5 *Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (stating that "intangible injuries, such
 6 as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm"). Over the
 7 years, TPCi has developed a worldwide network of licensees that support and protect the quality
 8 of the rich Pokémon universe, including in connection with the Pokémon TCG. (Finch Decl. ¶
 9 10.) By suggesting an affiliation that does not exist, Sahagian's PokéBeach Site and its TCG One
 10 game interfere with that network, threatening both TPCi's reputation and the quality of users'
 11 experience. *See MySpace*, 498 F. Supp. 2d at 1305-06 (finding, in case alleging violation of
 12 CAN-SPAM Act, that defendant's "misleading suggestions that he is affiliated with Plaintiff
 13 impacts the quality of MySpace.com users' experiences with Plaintiff's services").

14 3. It Will Be Difficult To Measure TPCI's Injuries.

15 Moreover, a preliminary injunction is warranted because it would be difficult, if not
 16 impossible, to determine the damages and lost profits that TPCi would sustain if Sahagian was
 17 allowed to continue his infringement. *See Rent-A-Center, Inc. v. Canyon Television & Appliance*

18 *Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (upholding district court's finding that damages
 19 would be "difficult to valuate and thus constituted possible irreparable harm"); *Salinger v.*
 20 *Colting*, 607 F.3d 68, 81 (2nd Cir. 2010) ("Harm might be irremediable, or irreparable, for many
 21 reasons, including that a loss is difficult to replace or difficult to measure, or that it is a loss that
 22 one should not be expected to suffer. . . . [a]nd courts have tended to issue injunctions in this
 23 context because 'to prove the loss of sales due to infringement is . . . notoriously difficult.'")
 24 TPCi has acted promptly to protect its intellectual property, filing suit and seeking preliminary
 25 injunctive relief shortly after Sahagian announced the launch of the "new" PokéBeach Site in
 26 May 2015, including a new, more comprehensive card scans feature and the full integration of
 27 the completed TCG One game. (McChesney Decl. Exh. E at 4, 7; Finch Decl. ¶ 6.) Because

1 TPCi acted promptly, it would be extraordinarily difficult, if not impossible, to measure the harm
 2 TPCi will suffer if Sahagian is allowed to continue his widespread infringement of TPCi's
 3 copyrighted Pokémon Works while this matter is fully adjudicated, and users chose to play the
 4 infringing TCG One instead of PTCGO. That is a loss that TPCi "should not be expected to
 5 suffer." *WPIX*, 691 F.3d at 285-6.

6 4. Sahagian Will Be Unlikely To Compensate TPCi For Its Damages.

7 Finally, a defendant's inability to compensate a plaintiff for the damages it has inflicted is
 8 another factor in determining whether a preliminary injunction should be issued. *See WPIX*, 691
 9 F.3d at 285-6 ("The unlikelihood that defendant[] . . . would . . . be able to satisfy a substantial
 10 damage award further supports a finding of irreparable harm.") (internal quotation marks
 11 omitted); *Rosen Entm't Sys. v. Vision*, 343 F. Supp. 2d 908, 920 (C.D. Cal. 2004) (same). If TPCi
 12 prevails, it would be entitled to recover a significant statutory damages award. It is unlikely that
 13 Sahagian will be able to satisfy a substantial damages award. This is yet another reason why
 14 there is irreparable harm.

15 D. **The Balance Of Equities Tips Decisively In TPCi's Favor.**

16 "The rights conferred by copyright are designed to assure contributors to the store of
 17 knowledge a fair return for their labors." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471
 18 U.S. 539, 546 (1985). Here, TPCi has spent extraordinary time, effort, and resources developing
 19 and populating the rich Pokémon universe, including thousands of TCG cards for its Pokémon
 20 TCG. Through its efforts, TPCi has cultivated a devoted fan base which continues to expand as
 21 TPCi introduces and integrates new elements to the Pokémon universe and experience, including
 22 the PTCGO.

23 Sahagian, on the other hand, has brazenly scanned hundreds if not thousands of TPCi's
 24 Pokémon trading cards, superimposed his "PokéBeach.com" watermark on the scans of TPCi's
 25 cards, and been instrumental in developing, facilitating, and marketing a cheap knock-off of
 26 TPCi's PTCGO. He then incorporated these infringing copies of TPCi's copyrighted Pokémon
 27 Works on a website that includes links to third-party retailers, which links generate revenue for

1 his website. (McChesney Decl. Exh. E at 7; *see also* Complaint ¶ 28.) Although disguised as the
 2 “Ultimate Pokémon Fansite,” (Complaint ¶¶ 28, 32), Sahagian’s PokéBeach Site is in reality
 3 merely a vehicle for his widespread infringement of TPCi’s copyrighted Pokémon Works.
 4 Sahagian’s only interest, therefore, is to continue his infringing activities.

5 Considering all of the above, the balance of equities tips entirely in TPCi’s favor. TPCi
 6 has demonstrated a high likelihood of succeeding on the merits of its copyright infringement and
 7 DMCA claims. TPCi has also established that it is likely to suffer irreparable harm because,
 8 absent an injunction, Sahagian will be permitted to continue his willful and widespread
 9 infringement of TPCi’s copyrighted Pokémon Works. *See WPIX*, 691 F.3d at 287 (concluding
 10 that balance of hardships weighed heavily in favor of a preliminary injunction where “plaintiffs
 11 established both a likelihood of success on the merits and irreparable harm—the absence of an
 12 injunction would result in the continued infringement of their property interests in the
 13 copyrighted material”); *Cadence Design Sys. v. Avant! Corp.*, 125 F.3d 824, 830 (9th Cir. 1997)
 14 (“[T]he balance of hardships issue cannot be accorded significant — if any — weight in
 15 determining whether a court should enter a preliminary injunction to prevent the use of
 16 infringing material in cases where . . . the plaintiff has made a strong showing of likely success
 17 on the merits.”). In light of these circumstances, a defendant like Sahagian “who knowingly
 18 infringes another’s copyright cannot complain of the harm that will befall [him] when properly
 19 forced to desist from [his] infringing activities.” *Cadence Design*, 125 F.3d at 829 (internal
 20 quotation marks omitted).

21 **E. A Preliminary Injunction Would Serve The Public Interest.**

22 The public’s interest “in preserving rights provided by the federal copyright law” has
 23 been recognized as an interest supporting the grant of preliminary injunctive relief. *Lakedreams*
 24 *v. Taylor*, 932 F.2d 1103, 1110 (5th Cir. 1991); *see also* *Value Group, Inc. v. Mendham Lake*
 25 *Estates, L.P.*, 800 F. Supp. 1228, 1234 (D.N.J. 1992) (“The public interest will be served by
 26 upholding the copyright protection, and preventing the pirating of creative energies and
 27 resources that are invested in protected works.”). “Inadequate protections for copyright owners

1 can threaten the very store of knowledge to be accessed; encouraging the production of creative
 2 work thus ultimately serves the public's interest in promoting the accessibility of such
 3 works." *WPIX*, 691 F.3d at 287. Additionally, courts have recognized "a substantial public
 4 interest in avoiding customer confusion" in the copyright infringement context. *Ballas v.*
 5 *Tedesco*, 41 F. Supp. 2d 531, 542 (D.N.J. 1999).

6 Given the reputational harm and loss of goodwill threats discussed above with respect to
 7 the issue of irreparable harm, the public interest is served by preliminarily enjoining Defendant's
 8 willful and widespread infringements of TPCi's copyrighted Pokémon Works.

9 **F. The Bond Should Be Minimal Absent A Showing Of Damages From The Injunction.**

10 Rule 65(c) requires the Court to set bond before issuing preliminary relief. FED. R. CIV.
 11 P. 65(c). The Court has wide discretion in determining "the amount of security required, *if any.*"
 12 *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003) (internal quotation marks omitted);
 13 *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 733 (9th Cir. 1999). The bond may be set at zero
 14 where there is no evidence that a party will suffer damages from the issuance of an injunction.
 15 See *Gorbach v. Reno*, 219 F.3d 1087, 1092 (9th Cir. 2000). To support a request for a bond, the
 16 requesting party must submit evidence regarding likely damages. *Conn. Gen. Life Ins. Co. v.*
 17 *New Images of Beverly Hills*, 321 F.3d 878, 882-83 (9th Cir. 2003) (refusing to address a bond-
 18 related question on appeal where the district court was not presented with the bond issue).

19 Here, the injunction seeks to prevent Sahagian from using TPCi's copyrighted Pokémon
 20 Works. While Sahagian is improperly monetizing his infringements of TPCi's copyrighted
 21 works, he is not charging to access TCG One. Thus, he cannot argue that he would suffer
 22 substantial damages if the injunction were for some reason wrongly issued. As a result, TPCi
 23 requests that the Court set the bond at zero.

24 **IV. CONCLUSION**

25 Preliminary injunctive relief is eminently appropriate in light of the facts of this case. As
 26 described herein, Sahagian's infringement of TPCi's copyrighted Pokémon Works has been
 27 willful and widespread. And Sahagian has attempted to conceal his infringement by

1 superimposing his “PokéBeach.com” watermark on his infringing trading card scans, suggesting
2 an authorization to use TPCi’s intellectual property that did not, and does not, exist. That the
3 harm TPCi is likely to suffer from Sahagian’s actions is difficult to measure does not make it
4 illusory, nor does it justify allowing him to continue his infringing conduct. TPCi therefore
5 respectfully requests that the Court enter an order enjoining and restraining Defendant, and all
6 persons or entities acting in concert with him, during the pendency of this action and thereafter
7 perpetually from (a) copying, creating derivative works from, distributing copies of, and/or
8 publicly displaying the Pokémon Works, (b) operating, hosting, or otherwise making available to
9 the public the TCG One game, and (c) providing and distributing false copyright management
10 information, as set forth in the Proposed Order submitted herewith.

11 DATED: June 2, 2015

Respectfully Submitted,

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